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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS GONZALEZ-ASTACIO, Defendant and Appellant.	B210879 (Los Angeles County Super. Ct. No. NA066425)

APPEAL from an order of the Superior Court of the County of Los Angeles, Gary J. Ferrari, Judge. Affirmed.

Cannon & Harris and Donna L. Harris for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Carlos Gonzalez-Astacio (defendant) guilty of first degree murder. On appeal, defendant contends that the trial court committed prejudicial error by instructing the jury on felony-murder because there was insufficient evidence to support that instruction; in refusing to instruct on aiding and abetting because the evidence supported such an instruction; by denying defendant's motion to suppress his confession to police; and by admitting a statement made to police by the codefendant in which the codefendant stated that defendant committed the murder. We hold that there was sufficient evidence to support the instruction on felony murder, the evidence did not warrant an aiding and abetting instruction, the defendant's confession was properly admitted, and any error in the admission of his codefendant's statement to police was harmless. We therefore affirm the judgment of conviction.

FACTUAL STATEMENT

A. Prosecution's Case

According to Carol Priest, her brother, victim Thomas Priest, [1] had been a special education teacher, having taught in the Los Angeles Unified and Palm Desert School Districts for 30 years. Thomas was fluent in Spanish. When he was a young adult, Thomas told Carol that he was gay and had been since high school, but that he was not openly gay and that only a few close friends knew of his sexual orientation.

On Easter weekend 2004, as part of his spring break from teaching, Thomas visited Long Beach, where Carol and her husband James Berry (Berry) lived. Long Beach had "a large gay bar scene," and Thomas "would come for that scene." On Saturday night, April 10, 2004, Carol and Berry met Thomas and Steven King (King),

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[1] To avoid confusion, the opinion refers to Carol and Thomas Priest by their first names.

who had recently moved into Thomas's home. The four of them had drinks at the Queen Mary's "Observation Lounge," and then went their separate ways.

Carol and Berry made plans to meet Thomas and King for brunch the next day, Sunday, April 11, 2004, but that morning King had to leave "suddenly," so Carol and Berry met Thomas for brunch at his room, and they ate at Hamburger Mary's, a gay restaurant. Thomas "had quite a lot of champagne" during brunch. After brunch, Thomas went back to his room, and Carol and Berry returned home.

Although Carol and Berry had not originally made plans to meet with Thomas that night, they decided to have a drink with him early that evening because King had left unexpectedly and Thomas was alone. They met Thomas around 6:00 or 6:30 p.m. at the Falcon, a gay bar just around the corner from their home. Carol and Berry arrived at the bar first and were already seated when Carol saw Thomas come in the front door at the same time as two other men. Thomas began talking to the two men, who spoke in Spanish. Carol and Berry were seated on one side of the bar, and one of the men was standing up talking to Thomas, who translated the conversation for Carol and Berry. The other man, who had a backpack and was wearing a baseball cap backwards, was seated at the bar with his back toward Carol.

The men told Thomas that "they were in town from Puerto Rico and that they were staying at a church . . . ." The man who was standing did most of the talking. Carol recalled Thomas remarking that the two men did not "'sound like [they were] from Puerto Rico. [They sounded] like [they were] from Mexico.'" One of the men produced an identification card from Puerto Rico, showed it to them, and then "played Ricky Martin on the juke box."

Carol noticed that the man doing most of the talking was wearing a "big" diamond stud in the top of his ear. Thomas and the two men "seemed to be getting along, joking and having a good time." According to Carol, Thomas and the more talkative of the two men appeared to be "chatting each other up." Carol and Berry, each of whom had to work the next morning, were being left out of the conversation and "didn't really know what was being said." They decided to go home.

According to Berry, on Saturday night, April 10, 2004, he and Carol met Thomas and King at the Queen Mary. Berry understood that King was scheduled to spend the weekend in Long Beach with Thomas, but the next morning, April 11, King's father became ill and King left suddenly.

Berry and Carol "got together" with Thomas during the day on April 11, 2004, and again around 5:00 or 6:00 p.m. at the Falcon. When Berry walked into the bar with Carol, Thomas, who was already there,[2] introduced them to two Hispanic men in their twenties, perhaps late twenties, whom Thomas had met on his way into the bar. Thomas spoke to the men in Spanish and translated for Berry and Carol. Berry recalled Thomas asking the two men "where they were from" and, when the men replied "'Puerto Rico,'" Thomas said, "'Your accent doesn't sound like Puerto Rico. It sounds like you're from Mexico.'" One of the men produced an identification card and showed it to Thomas who said, "Yeah, it's an I.D. from Puerto Rico, but your accent sounds like [you're] from Mexico." Berry and his wife stayed at the Falcon for less than an hour. When the couple left, Thomas was still with the two Puerto Rican men.

On the evening of April 11, 2004, Joe Goff (Goff) was at the Falcon for an early celebration of his birthday, which was the next day. According to Goff, the Falcon was "really, really small; . . . like a studio apartment." Sometime after 8:00 p.m., Goff saw an older Caucasian man, Thomas, having drinks and socializing by the jukebox with two younger Hispanic men. The two Hispanic men were drinking beer and had three or four beers a piece during the two hours Goff observed them. Thomas was drinking hard alcohol, but was not drinking as much as the two Hispanic men. One of the Hispanic men had a piercing in his ear. Goff described it as "an industrial . . . piercing that is through the cartilage . . . . [It was] a long spike . . . that goes through your ear."[3] Goff,

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[2] As noted above, Carol testified that she and Berry arrived at the Falcon before Thomas.

[3] According to Goff, the man with the earring looked like defendant's driver's license photo.

who was gay, characterized the interaction between Thomas and the two Hispanic men as "[f]lirtation, . . . close, in-your-face conversation, flirtation" as if "someone [is] trying to pick you up . . . ." From Goff's experience, a person would "not be so in your face unless [he was] trying to come on to you." Thomas and the two Hispanic men left the Falcon before midnight in a taxi.

On April 12, 2004, Teresa Contreras (Contreras) was working as a housekeeper at the Vagabond Inn in Long Beach. That afternoon, she went to "make up" room 321, but when she knocked on the door, no one answered. Using her key, Contreras opened the door, put her head in the room, and saw someone who she believed was asleep. She notified the front office, and they sent up her husband, Noberto Juarez (Juarez), a maintenance worker at the motel.

Juarez also recalled an incident at the Vagabond Inn at room 321. After his wife notified the office about an issue with that room, the motel manager told Juarez to "go up there and see what was going on." When Juarez arrived at room 321, he "knocked and knocked, [but] nobody would answer." Juarez returned to the office and reported the situation to the general manager who returned with Juarez to the room. They knocked again, but when no one answered, they returned to the office where another manager called someone in security who, in turn, called the police.

On April 12, 2004, Sheikh Rahman (Rahman) was working as the front desk manager at the Vagabond Inn in Long Beach. After the 12:30 p.m. check-out time, Rahman was informed that a guest had not checked out, so he sent a maid to knock on the door. The maid returned to the office and reported seeing someone in the room lying in the bed. Rahman called someone in security who went to the room and then called the police. Thereafter, a policeman came to the office and asked Rahman if he had records concerning room 321. Rahman provided the policeman with the registration card and a computer printout showing a check-in date of April 10, 2004, and a check-out date of April 12, 2004. The printout also showed telephone charges to that room of $18.18. There was one telephone charge of $2.25 for a call to the 787 area code, which charge

meant the call lasted a minute or less.[4] That first call to the 787 area code was made at 9:45 p.m. The printout also showed a second charge of $15.90 for a call to the 787 area code that was made at 10:08 p.m. The room and telephone charges were charged against a credit card.

On April 12, 2004, City of Long Beach Police Officer Neil Vadnais was on patrol in a marked police car when he received a call to respond to the Vagabond Inn. He contacted a "custodian or maid" who informed him that she had knocked on the door to a room, but no one answered. Officer Vadnais and another officer went to the room, knocked, and, when no one answered, they opened the door. Inside the room, he saw someone in the bed under the covers. Officer Vadnais called out, but did not get any response. He then walked into the room, looked under the covers, and saw a deceased person and "a lot of blood." He contacted a sergeant and immediately secured the scene. They then waited until detectives came to the scene and conducted an investigation. Officer Vadnais interviewed Contreras and Juarez.

In 2004, City of Long Beach Police Officer Daniel Mendoza was assigned to the forgery fraud detail. As part of the investigation into Thomas's death, Officer Mendoza contacted Transunion, a credit bureau that maintains credit histories. He was informed that Thomas had seven accounts listed in his name, including a credit card account with First Premier Bank. Officer Mendoza obtained a court order requesting a transaction history on the First Premier Bank account. The history showed that on April 12, 2004, someone had unsuccessfully attempted to use that card to withdraw $50 at an ATM located in a Burger King restaurant in Santa Ana. Officer Mendoza went to the Burger King and obtained a copy of a transaction receipt showing that on April 12, 2004, at 7:55 a.m., an attempted transaction using Thomas's First Premier Bank card had been declined.

On April 12, 2004, City of Long Beach Police Detective Mark McGuire was assigned as a homicide detective to investigate a murder that occurred in room 321 of the

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[4] The motel charged a minimum of $2.25 per minute for telephone calls.

Vagabond Inn in Long Beach. The police located and identified Thomas's car in the motel parking lot. Inside room 321, Detective McGuire observed "cast off" and "spatter" blood on the ceiling and on the wall near the head of the bed. There was also blood spatter on the television set, which was on and tuned to a Spanish language station. Detective McGuire looked for the victim's wallet, cell phone, and car keys, but could not locate them.

Once Detective McGuire returned to the police station, he called the two phone numbers in the 787 area code that were listed on the computer printout for room 321. One of the numbers was disconnected and he left a message at the other number. Gladys Pacheco (Pacheco) responded to the message and informed Detective McGuire that she was in Puerto Rico. Using a ruse, Detective McGuire was able to learn that Pacheco's nephew, Alvaro Carrasquillo (Carrasquillo), had called her from California. She also told the detective that Carrasquillo had been sent from Puerto Rico to a drug rehabilitation center somewhere in California.

Detective McGuire then obtained a search warrant for records pertaining to the Puerto Rico telephone numbers. He discovered a 714 area code number to which Pacheco had made calls and from which she had received calls. Detective McGuire obtained a second search warrant for records for the 714 number, which was a cell phone number. Those records contained an address in Santa Ana for the owner of the cell phone—the Victory Outreach Rehabilitation Center (Victory Outreach). [5]

Detective McGuire went to Victory Outreach and spoke to Benito Olivera (Olivera). When the detective mentioned Carrasquillo's name, Olivera said he was very familiar with Carrasquillo. Olivera also told Detective McGuire that Carrasquillo had a close friend—defendant—who had lived at Victory Outreach. The detective then reviewed files at Victory Outreach and obtained further information on Carrasquillo and defendant. Olivera told Detective McGuire that both men had been asked to leave

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[5] The Victory Outreach facility was a church that administered a drug rehabilitation program.

Victory Outreach because they had been fighting and disobeying rules. In addition, Olivera informed Detective McGuire that "he saw some panties in [defendant's] clothes when [defendant] unpacked." Later, that prompted Olivera to ask defendant if he was gay or bisexual, and defendant responded that he was bisexual.

From the information in the Victory Outreach files, Detective McGuire was able to obtain a California driver's license for defendant with his photograph. During a search of a residence that Detective McGuire located using Carrasquillo's cell phone number, he obtained a photograph showing both defendant and Carrasquillo. A woman at that residence who provided that photograph also gave Detective McGuire an Alabama telephone number for defendant. The detective "ran" the phone number, obtained a residence address, and asked Sergeant Montgomery of the City of Cullman Police Department in Alabama to conduct surveillance of that residence to determine if defendant lived there. When Sergeant Montgomery confirmed that defendant had been seen at the residence, Detective McGuire flew to Alabama in June 2005 and contacted defendant. When the detective contacted defendant in Alabama, defendant had an earring in the top of his left ear.

In April 2005, Cullman Police Sergeant Craig Montgomery was asked by Detective McGuire to confirm that defendant was residing in Cullman, Alabama. Over the next few weeks, Office Montgomery conducted surveillance of a house where he believed defendant was residing. Sergeant Montgomery was able to confirm that defendant was living in Cullman with an uncle and was working in a manufacturing plant in an adjacent county. Sergeant Montgomery provided Detective McGuire with the information he had acquired about defendant, and the detective flew to Alabama and contacted defendant at his workplace.

Thereafter, on July 12, 2005, Detective McGuire contacted Sergeant Montgomery to inform him that the Long Beach Police had obtained a warrant for defendant's arrest and to request that Sergeant Montgomery arrest defendant. Sergeant Montgomery went to defendant's residence and was informed that defendant was already incarcerated at the county jail. Sergeant Montgomery went to the county jail, brought defendant back to the

Cullman Police Department, and interviewed him along with Cullman Police Officer Shane Drake, who spoke Spanish. Sergeant Montgomery did not speak to defendant on the drive to the Cullman Police Department and he did not see any blemishes or marks on defendant's face.

On June 29, 2005, Officer Drake went with Sergeant Montgomery to defendant's workplace and interviewed him. The officers also interviewed defendant at the Cullman Police Department on July 6, 2005. On July 7, 2006, at 11:51 p.m., defendant was arrested for an incident unrelated to the Long Beach murder investigation. At approximately 2:30 a.m. on July 8, 2005, defendant was involved in an assault on the deputies who had detained him at the county jail.

On July 12, 2005, Officer Drake acted as a translator during an interview of defendant conducted by Sergeant Montgomery at the Cullman Police Department. Officer Drake did not notice any blemishes or marks on defendant's face at the time of the interview.

The interview was videotaped and played for the jury. According to the transcript of that interview, the following exchanges took place during the interview: After Officer Drake read defendant his rights in Spanish, Officer Drake and Sergeant Montgomery proceeded to interview defendant. After explaining the unrelated incident that led to his arrest and incarceration in the county jail, defendant explained the incident that occurred with the deputies at the county jail. Sergeant Montgomery then told defendant that Long Beach Police Officers had spoken to Carrasquillo about the incident in California. Officer Drake asked defendant, "[W]ho is [Carrasquillo] going to say . . . killed [Thomas]?" Defendant replied that Carrasquillo could give one of three responses: (i) he could deny that he did it; (ii) he could say that defendant did it; or (iii) he could say he did not know who did it. When defendant asked what Carrasquillo told the Long Beach Police Officers, Sergeant Montgomery replied, "He said you did it." Defendant laughed and said, "Very bad." Defendant later denied that he killed Thomas—"me no kill him"—to which Sergeant Montgomery replied, "You did kill a man. You did too. And I know . . . why you killed him. To protect yourself." After more colloquy, Sergeant

Montgomery asked, "[Thomas] was bothering you?" Defendant replied, "Yeah," and then said, "eight times." Defendant told the officers that he asked Thomas not to play with him and told Thomas "no touch me please. Not touch me."

Following further colloquy, defendant explained, "[R]emember that . . . this man [Thomas] is a homosexual. And I am aware that at any moment he is going to get close and he is going to say something, you understand?" At that point, defendant admitted he was protecting himself from Thomas, but maintained that he did not kill him. Sergeant Montgomery then admonished defendant to tell the rest of the story and defendant replied, "I don't know what [Carrasquillo] would say that supposedly it was me who killed [Thomas] with the bottle. Is [*sic*] killing this man with the bottle." Sergeant Montgomery responded by telling defendant that "[Carrasquillo said] you used the bottle to protect yourself." When Sergeant Montgomery again admonished defendant to tell the truth, defendant responded, "[The truth] is that this man is [unintelligible in Spanish], I am [unintelligible in Spanish] the fucking bottle." Sergeant Montgomery asked defendant if he reacted because Thomas touched him and defendant replied, "Yeah, he fucking touched me [unintelligible in English]. I says, 'Hey . . . [Carrasquillo]. Give me fucking bottle' and [Carrasquillo] says, 'Where is the bottle.' Give me one, okay . . . 'Motherfucker, I told you, [noises] don't touch me. And in the impact, you know [unintelligible in English] like 20's, 18 [unintelligible in Spanish] in the heart [ph]. Okay, I kill it [ph] the fucking man. He is fucking talk to me. [Carrasquillo] says [unintelligible in English] 'Carlos what you gonna do? 'This man touched me. I told you.' I say, 'I told you that this man is no fun.'" Officer Drake asked defendant if he intended to kill Thomas, to which defendant replied, "No! Yes . . . I remember . . ."

Following more colloquy, Sergeant Montgomery asked defendant how many times he hit Thomas with the bottle. Defendant responded, "I don't remember so much. The fighting [unintelligible in Spanish] [laughs] . . . [unintelligible in English], one, two, three [unintelligible in English] I'm going to count . . . I don't know if I can . . . . Wow! [unintelligible in English] twenty-three, twenty-four, in back" When Officer Drake asked defendant where he hit Thomas, defendant said, "On the head. On the head. . . . Only on

the head. So if you look in the body [*sic*] it say, its . . . uh, normal." When Sergeant Montgomery asked defendant if he intended to hurt Thomas when he went to the motel, defendant replied, "No . . . No . . . no . . . no [*sic*] yes I told you . . . that me kind of [*sic*] . . . . We got to the motel." Defendant then provided more details of what happened once the three men arrived at the motel. According to defendant, when he arrived at the motel, he wanted to shower because he had been living on the street. While defendant was dressing, Thomas touched defendant's leg and defendant stated, "Hey, don't touch me please. Don't touch me." Defendant was not wearing his t-shirt or shoes, but he had his jeans on. As defendant tried to dress faster, Thomas touched him and defendant said, "Hey, man I told you . . . ." Defendant became angry and said, "No touch me." Defendant was trying to put on his t-shirt while he, Carrasquillo, and Thomas were sitting on the bed. Thomas was not wearing clothes and told defendant that he liked to sleep without clothes. Defendant told Thomas "Hey, man, you very drunk." Thomas told defendant that there were two "beautiful guys in here" and that he wanted to have sex. Defendant then explained, "one punch the first time." Defendant further explained that he first hit Thomas on the right side of the head and Thomas "went down." Defendant then stated, "When [Thomas] fell on the bed I kept hitting him, hitting him, hitting him, hitting him. Hitting him. Impact, impact, impact, impact. [pause] impact. 'I told you motherfucker no touch me.'" Defendant told the officers that Carrasquillo did not hit Thomas that night; only defendant hit Thomas. Defendant then told the officers that he cleaned the room because he had touched everything. He took out the garbage, including the bottle, but Carrasquillo stayed behind in the room. Defendant assumed Carrasquillo was getting dressed while defendant was disposing of the garbage. Defendant denied taking Thomas's wallet from the room. While downstairs, he smoked a cigarette and waited 10 to 15 minutes for Carrasquillo. Defendant said he took the second to the last bus out of Long Beach that evening, at about 11:15 p.m., and Carrasquillo was not with him. He went to "Areli's" home, where he had been staying. He saw Carrasquillo Tuesday and Carrasquillo had between $15 and $30 and a new cell phone. Defendant

admitted trying to use an ATM or credit card at a Burger King and appeared to acknowledge that it was Thomas's card.

Deputy Medical Examiner Vladimir Levicky performed the autopsy on Thomas's remains. Dr. Levicky observed injuries to Thomas's head, mostly on the right side. He did not observe any injuries to the torso or extremities of the body. The blood alcohol level in the peripheral extremities was .15, while the level of the "central blood," taken from the heart, was .24. Based on those two blood alcohol levels, Dr. Levicky opined that Thomas had ingested "a fairly substantial amount of alcohol" within an hour of his death and was moderately intoxicated at the time of his death.

Dr. Levicky observed several contusions on Thomas's head. He also observed lacerations on the right and left forehead. The laceration on the right forehead was deep, extending to the skull, and was caused by "some object that was not too sharp but was pointed." It could have been caused by a champagne bottle, but the bottle was probably broken.

In addition to the deep laceration to the right forehead, Dr. Levicky observed at least four other "major locations of blunt force trauma." There were indications of blunt force trauma above the right ear, in front of the right ear, on the right cheek, and on the chin. There was also an indication of blunt force trauma on the left forehead near the hairline.

When Dr. Levicky opened the skull, he observed a "subarachnoid hemorrhage, that was surrounding the entire brain." There was swelling of the brain and there were hemorrhages in all the brain ventricles which were consistent with the skull being struck by several blunt force blows. There was also a laceration on the right side of the brain that corresponded to the deep laceration to the right forehead. That injury was the result of a blow strong enough to facture the skull. That blow was stronger than the blows that caused the other contusions in the same general area. Dr. Levicky concluded that Thomas died of blunt force trauma to the head. Due to the swelling of the brain, Dr. Levicky also concluded that Thomas was alive for several minutes after sustaining his injuries.

B. Defendant's Case

Defendant called four character witnesses to testify on his behalf—his childhood babysitter, his older brother, his aunt, and his cousin. Each witness testified that they had not seen defendant exhibit violent tendencies.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged defendant in an amended information in Count 1 with murder in violation of Penal Code section 187, subdivision (a)[6]—a felony; in Count 3[7] with theft in violation of section 484e, subdivision (d)—a felony; and in Count 4 with petty theft in violation of section 484, subdivision (a)—a misdemeanor. The trial court granted the prosecution's motion to dismiss Counts 3 and 4, and the matter proceeded to a jury trial on Count 1. The jury found defendant guilty of first degree murder and the trial court sentenced defendant to a term of 25 years to life.

DISCUSSION

A. Evidence in Support of Felony-Murder Instruction

During a discussion of jury instructions, defendant's trial counsel objected to the felony-murder instruction on the ground that there was insufficient evidence to support a finding that the murder was committed during a robbery or burglary.[8] The trial court overruled the objection and thereafter instructed the jury on felony-murder, as well as on robbery and burglary.

Defendant contends that there was insufficient evidence to support the felony-murder instruction given by the trial court. According to defendant, there was no

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[6] All further statutory references are to the Penal Code unless otherwise noted.

[7] Count 2 was asserted only against codefendant Carrasquillo.

[8] Defendant was not charged with either robbery or burglary.

evidence that defendant or Carrasquillo intended to rob Thomas when they entered the motel room, and any theft or robbery that occurred after Thomas's death would not support a felony-murder conviction.

"Even absent a request, the trial court must instruct on the general principles of law applicable to the case. ([*People v.*] *Koontz* [(2002)] 27 Cal.4th [1041,] 1085.) The general principles of law governing a case are those that are commonly connected with the facts adduced at trial and that are necessary for the jury's understanding of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [31 Cal.Rptr.2d 128, 874 P.2d 903].) The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. (*Ibid*.) Evidence is 'substantial' only if a reasonable jury could find it persuasive. (*People v. Hagen* (1998) 19 Cal.4th 652, 672 [80 Cal.Rptr.2d 24, 967 P.2d 563].) The trial court's determination of whether an instruction should be given must be made without reference to the credibility of the evidence. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944 [90 Cal.Rptr.2d 143, 987 P.2d 168].) The trial court need not give instructions based solely on conjecture and speculation. (*People v. Day* (1981) 117 Cal.App.3d 932, 936 [173 Cal.Rptr. 9].)" (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

Contrary to defendant's assertion, there was substantial evidence to support a finding that defendant intended to commit robbery or burglary when he entered Thomas's motel room. Thomas, a gay man in his fifties,[9] found himself alone in Long Beach after his companion for the weekend, King, left abruptly on the morning of the murder. Carol observed that Thomas drank heavily on the afternoon of the murder and continued to drink that evening, enough so that he had a substantial amount of alcohol in his blood and was "moderately intoxicated" at the time of his death. And defendant admitted that Thomas was "very drunk" in the motel room.

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9 Based on Carol's testimony that Thomas had taught school for approximately 30 years, Thomas was at least 53 at the time of his death.

Defendant told the police that he and Carrasquillo were living on the street, and the police had confirmed that they had been asked to leave Victory Outreach facility where they had been staying. Berry testified that Thomas met defendant and Carasquillo outside the Falcon, a gay bar, and entered the bar with them. The two Hispanic men were in their twenties, i.e., significantly younger than Thomas. According to defendant, Thomas described the two men as "two beautiful guys" with whom Thomas wanted to have sex. Carol testified that Thomas and defendant were "chatting each other up" and Goff said they were flirting "as if someone [was] trying to pick you up . . . ." After drinking together in the Falcon for over two hours, the three men left in a taxi together and went to Thomas's room. According to defendant, at some point before the murder, Thomas was undressed, sitting on the bed with defendant who had no shirt or shoes on.

After the murder, Thomas's wallet and cell phone were missing. And, just before 8:00 a.m. the morning after the murder, Thomas's credit card was used at an ATM in an unsuccessful attempt to withdraw $50.00.

The foregoing evidence supports the theory the prosecutor asserted in support of the felony-murder instruction—that defendant and Carrasquillo, who were living in the street and presumably unemployed, targeted Thomas outside the Falcon, drank and flirted with him, and then returned with him to the room, not for a sexual liaison, but to take advantage of him and steal his money and property. Although the evidence may also support an alternative theory—that defendant and Carasquillo returned to the room with Thomas to shower and change—there was sufficient evidence to support the felony-murder instruction based on robbery and burglary. (See *People v. Turner* (1990) 50 Cal.3d 668, 688 ["when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery"].) Here, there was evidence—beyond the killing of Thomas and the taking of his wallet—that supported a reasonable inference that defendant targeted Thomas, who was alone and intoxicated, flirted with him to gain his confidence, and then took advantage of him in the motel room. Moreover, the jury could have reasonably inferred that defendant decided to

kill Thomas in the course of the robbery to keep him from summoning help or identifying defendant to the police.

B. Failure to Give Aiding and Abetting Instruction

Defendant contends that the trial court erred by failing to instruct the jury sua sponte on aiding and abetting. According to defendant, there was evidence from which the jury could have concluded that defendant killed Thomas in the heat of passion in response to Thomas's unwelcome sexual advances and that Carrasquillo, not defendant, took Thomas's wallet and cell phone. As defendant views the evidence, those facts, if found by the jury, could have led to the jury to conclude that defendant nevertheless could be guilty of first degree felony-murder because he waited downstairs while Carrasquillo took the wallet, including the credit card, and went with Carrasquillo the next day and tried to use the card. Defendant argues that the potential for the jury misapplying an unasserted accomplice liability theory required the trial court to instruct on aiding and abetting to ensure the jury properly understood and applied any potential accomplice liability theory supported by the evidence.

As discussed, a trial court has a sua sponte duty to instruct on all legal theories supported by the evidence, but has no duty to instruct based on speculation and conjecture. (*People v. Young*, *supra*, 34 Cal.4th at p. 1200.) And, a trial court has no duty to instruct on aiding and abetting when the case is not tried on that theory and the evidence does not support it. "Instructions on aiding and abetting are not required where '[t]he defendant was not tried as an aider and abettor, [and] there was no evidence to support such a theory . . . .' (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 404 [226 Cal.Rptr. 880].)" (*People v. Young*, *supra*, 34 Cal.4th at p. 1201.)

The prosecution did not try the case on an aiding and abetting theory. Instead, as to felony-murder, the prosecution relied on a direct perpetrator theory, i.e., defendant intended to rob Thomas when he went to the motel room with him and committed the murder in the course of the robbery. There was no suggestion by the prosecution of an alternative theory under which defendant knew of Carrasquillo's intent to rob Thomas

and took some action to aid that robbery. Moreover, the evidence does not support such a theory.

Under defendant's view of the evidence, which is based in large part on his videotaped statement to police, neither defendant nor Carrasquillo went to Thomas's room with the intent to rob Thomas or commit some other felony in the room. Instead, defendant claimed that he killed Thomas in the heat of passion and, while defendant was downstairs taking out the garbage and smoking, Carrasquillo, *without defendant's knowledge*, took Thomas's property, including his credit card, which defendant and Carrasquillo attempted to use the next morning. Under that interpretation of the evidence, there could be no felony-murder because Carrasquillo took the wallet *after* the attack on Thomas, and defendant *was unaware* that Carrasquillo had taken it. Although defendant speculated to police that Carrasquillo took the wallet while defendant waited downstairs, that speculation was based on information defendant obtained two days after the murder when he saw Carrasquillo with $15 to $30 and a new cell phone. Because the evidence did not support a finding of felony-murder against defendant on the theory he killed Thomas while aiding and abetting Carrasquillo's robbery of Thomas, the trial court did not err in failing to instruct on that theory.

C. Voluntariness of Confession

During the pretrial hearing on defendant's motion to suppress the statement he gave to Sergeant Montgomery and Officer Drake, both of the Alabama officers testified, as did defendant. According to Sergeant Montgomery, defendant had been in custody since July 7, 2005, at another agency, the Cullman County Sheriff's Department, on unrelated charges. Because Sergeant Montgomery did not speak Spanish, he did not converse with defendant during the drive from the county jail to the Cullman Police Department on July 12, 2005. When Sergeant Montgomery picked defendant up at the county jail to take him back to the Cullman Police Department for the interview, he was informed that defendant had "acted up" and had to be restrained by deputies at the county jail. At the beginning of the interview at the Cullman Police Department, Sergeant

Montgomery asked defendant about the encounter at the jail, and defendant showed the Sergeant his left cheek, head, and hand, the areas where defendant claimed he was struck by the deputies at the county jail.

Before the interview on July 12, 2005, at approximately 3:00 p.m., Sergeant Montgomery witnessed Officer Drake, who was fluent in Spanish, give defendant a *Miranda* warning in Spanish and instruct defendant to read it out loud. At no time during the interview did defendant request an attorney or request that the interview be stopped. The interview lasted an hour and 15 minutes.

Officer Drake had a bachelor's degree in Spanish, had lived in Chile for two years, and had taught Spanish as a high school teacher. Officer Drake was present on July 12, 2005, during the interview of defendant at the Cullman Police Department, and he read defendant his *Miranda* rights in Spanish before discussing anything substantive about the murder investigation. Defendant was also shown a written advisement and waiver of rights form which he read and then reread aloud. On the advisement form next to the question, "Do you understand what you have read?" defendant checked the box for "si" or yes. Defendant then signed the form acknowledging the waiver of his rights. After the *Miranda* advisement was given to defendant, he told the officers about the incident in the county jail.

Defendant testified at the suppression hearing as follows: Defendant was arrested in Cullman, Alabama. After he was arrested, the police came to the jail and took defendant to a room where they questioned him. The police did not ask defendant if he wanted an attorney present during the questioning. Defendant was taken to the interview room three times before the interrogation that was videotaped. The first and second times he was taken to the interview room, the police did not inform defendant of his right to remain silent. Moreover, on those first two occasions, the officers asked defendant about the killing of Thomas, but he did not give them any information.

Defendant admitted that he signed the advisement and waiver of rights form, but claimed he did not have time to read it. Defendant also asked for the assistance of an attorney before he gave any statement.

Defendant claimed that he had been beaten at the county jail before the interview during which he confessed. He was beaten about the head, face, and back, causing redness and pain. He told Sergeant Montgomery and Officer Drake that he had been beaten while in custody. He also believed that he might be beaten again, and that is why he spoke to the officers. According to defendant, Sergeant Montgomery and Officer Drake were "pushing [him], forcing [him]." He did not freely give up his right to remain silent. Sergeant Montgomery threatened, "If you don't want to continue – if you don't want things to keep going along as they are in jail . . . ." Defendant believed he would be beaten if he did not speak with them and answer their questions. Defendant characterized his signing of the advisement and waiver form as "all forced and fast, 'sign.'"

After hearing the witnesses' testimony on the motion to exclude defendant's confession, the trial court denied the motion, stating, "I find the two police officers to be credible witnesses and note that this beating, which one of the officers testified to, was in response to something that [defendant] did, [and] happened several days before the confession, . . . [at] another agency. [¶] I've heard nothing in this hearing that would lead me to believe anything but that this confession was not coerced and it was, in fact, completely voluntary."

Notwithstanding that Officer Drake read defendant his rights in Spanish and that defendant signed a form acknowledging his understanding and waiver of those rights, defendant contends that "the advisal in this matter was incomplete and insufficient to dispel the presumption of voluntariness." According to defendant, when Officer Drake asked defendant if he understood his rights and wanted to speak to the officers, defendant gave an equivocal response that was insufficient on the issue of voluntariness.

"A defendant's admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489 [92 S.Ct. 619, 626-627, 30 L.Ed.2d 618]; *People v. Markham* (1989) 49 Cal.3d 63, 71 [260 Cal.Rptr. 273, 775 P.2d 1042].) A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. (*Colorado v.*

Connelly (1986) 479 U.S. 157, 167 [107 S.Ct. 515, 521-522, 93 L.Ed.2d 473]; *People v. Benson* (1990) 52 Cal.3d 754, 778 [276 Cal.Rptr. 827, 802 P.2d 330].) On appeal, we review independently the trial court's determination on the ultimate legal issue of voluntariness. (*People v. Benson*, *supra*, at p. 779.) But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including '"the characteristics of the accused and the details of the interrogation" (*Schneckloth v. Bustamonte* [(1973)] 412 U.S. [218], 226 [36 L. Ed. 2d 854, 862, 93 S. Ct. 2041]),' are subject to review under the deferential substantial evidence standard. (*People v. Benson*, *supra*, at p. 779.)" (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.)

"In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [113 S.Ct. 1745, 1754, 123 L.Ed.2d 407]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [60 Cal.Rptr.2d 225, 929 P.2d 544]; *People v. Benson*, *supra*, 52 Cal. 3d at p. 779.) Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' (*Withrow v. Williams*, *supra*, 507 U.S. at pp. 693-694 [113 S.Ct. at p. 1754].)" (*People v. Williams*, *supra*, 16 Cal.4th at p. 660.)

After hearing the testimony of the two interrogating officers and defendant at the suppression hearing, the trial court expressly found the officers to be credible and implicitly found defendant not credible. In doing so, the trial court rejected defendant's assertions that he asked for an attorney, did not read the advisement and waiver form, and felt threatened by Sergeant Montgomery's remark and the potential for another beating. Given the trial court's credibility determinations and that defendant had his rights read to him in Spanish after which he read those rights himself and then signed the waiver form, the trial court did not err in finding that defendant's confession was voluntary.

Defendant contends that the transcript of his statement to police demonstrates[10] that he never unequivocally stated that he understood his right and agreed to waive them. We disagree.

When defendant was first asked if he wished to talk to the officers he stated, "So it says if I like to talk [*sic*] on you now it say this, right?" When Officer Drake responded, "Yes," defendant replied, "Uh . . . [unintelligible in English]." Officer Drake then stated, "[unintelligible in English] a little bit . . . difficult," to which defendant replied, "No." Although defendant's responses in the transcript appear equivocal, there are key portions that were unintelligible, and both officers testified that he knowingly and voluntarily waived his rights, testimony the trial court found credible.

Moreover, after defendant explained to the officers the incident that resulted in his arrest and incarceration by the Cullman County Sheriff's deputies, Sergeant Montgomery again inquired, "Okay. So he understood his uh rights, correct?" Officer Drake replied, "Uh-huh" and Sergeant Montgomery asked "And he says he . . . he wishes to talk to us now?" to which Officer Drake responded "Yes, sir" and defendant responded, "Uh-huh." That exchange supports the officer's testimony that defendant understood and voluntarily waived his rights. The transcript of defendant's statement does not establish that his statement to the Alabama police was involuntary or otherwise negate the testimony of the officers. The factual findings by the trial court concerning the circumstances surrounding the confession are supported by substantial evidence. Under these circumstances, the trial court did not err in concluding that the confession was voluntary and admitting it.

D. Admission of Carrasquillo's Statement to Police

As discussed above, during the interview in which he confessed to killing Thomas, defendant asked the Alabama police officers what Carrasquillo told the Long Beach police officers about Thomas's murder. In response, Sergeant Montgomery said, "He

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10 The advisement and waiver form signed by defendant was an exhibit on the motion to suppress, but it does not appear that the videotape or the transcript of that tape were submitted as exhibits at the hearing on the motion.

[Carrasquillo] said you did it." During trial, prior to the playing of the video tape of defendant's statement to the Alabama police officers, his counsel objected "to any statements in the tape that relate to what . . . Carrasquillo, the co-defendant, may have said about [defendant] as being hearsay and not admissible." Defendant's counsel also characterized those statements as "inflammatory." The trial court overruled the objections.

Defendant contends that the trial court erred when it overruled the hearsay objection to the statement attributed to Carrasquillo and on the additional ground that the admission of that statement violated his right to confrontation under the Sixth Amendment. The Attorney General counters that defendant forfeited his Sixth Amendment argument by failing to raise it in the trial court, citing *People v. Burgener* (2003) 29 Cal.4th 833, 869 and *People v. Alvarez* (1996) 14 Cal.4th 155, 186. Relying on *People v. Partida* (2005) 37 Cal.4th 428, defendant argues that because Carrasquillo's statement had the additional legal consequence of violating defendant's right to confrontation under the Sixth Amendment, he did not forfeit on appeal his challenge to the admission of the statement on that ground.

Because defendant made a hearsay objection to the challenged statement, but did not make a separate objection under the confrontation clause, the Attorney General's assertion of forfeiture is supported by the authorities. (See *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Burgener, supra,* 29 Cal.4th at p. 869; *People v. Dennis* (1998) 17 Cal.4th 468, 529; and *People v. Alvarez, supra,* 14 Cal.4th at p. 186.) Based on those authorities, we hold that defendant forfeited his confrontation clause argument.

Defendant also challenges the trial court's ruling on the hearsay objection under California law, contending that the statement was "extremely inflammatory and prejudicial hearsay not relevant other than to establish defendant's guilt." In response to the hearsay objection, the trial court sought and obtained from the prosecutor an assurance that the statement was not being offered for the truth of the matter asserted therein. And, the prosecutor did not argue the statement for the truth of the matter asserted. The statement therefore was not inadmissible hearsay. "An out-of-court

statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. (*People v. Armendariz* (1984) 37 Cal.3d 573, 585 [209 Cal.Rptr. 664, 693 P.2d 243]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1204-1205 [249 Cal.Rptr. 71, 756 P.2d 795]; see *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [179 Cal.Rptr. 61] [‘“one important category of nonhearsay evidence - - evidence of a declarant’s statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer’s reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.”’].) (*People v. Turner* (1994) 8 Cal.4th 137, 189.) Thus, the trial court did not err under California law by admitting the statement for nonhearsay purposes.

But even assuming the statement was erroneously admitted as inflammatory hearsay, any such error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 [an error is harmless unless it appears “reasonably probable” the defendant would have achieved a more favorable result had the error not occurred]. As discussed above, even if the trial court had excluded the statement attributed to Carrasquillo, all of defendant’s admissions that he killed Thomas nevertheless would have been introduced into evidence. Based on those admissions, which the jury by its verdict accepted as true, it was not reasonably probable that defendant would have received a different outcome on that issue had the challenged statement been excluded.

Moreover, even if we reached the confrontation clause issue, for reasons similar to those stated in our discussion of the hearsay objection, the admission of the statement did not violate the confrontation clause, because the prosecution did not offer the statement for the truth, and defendant took no affirmative steps on his own behalf to ensure that the

jury did not mistakenly consider it for the truth.[11] Thus, there was no confrontation clause violation. **(***People v. Davis* (2005) 36 Cal.4th 510, 548 ["[h]ere . . . there was no confrontation violation because the statements of [the out of court declarants] were not admitted as substantive evidence against defendant, but only to give meaning to defendant's admissions on the tape. (See *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 [158 L.Ed.2d 177, 124 S.Ct. 1354] [hearsay statements not admitted for their truth do not violate the confrontation clause]; accord, *People v. Turner* [(1994)] 8 Cal.4th [137,] 190–191; *People v. Preston* [(1973)] 9 Cal.3d [308,] 315–316.)"].)

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

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11 Defendant did not request that the trial court give a limiting instruction advising the jury that Carrasquillo's statement to the Long Beach Police could not be considered for the truth.